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FILED
DEC 7 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 482

HERBERT FREDERICK KORHOLZ, ROCK WOOL INSULATING COMPANY, also known as ROCK WOOL INSULATION CORPORATION, a corporation, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. No Offense Against the Labor Management Relations Act of 1947 Was Committed

In its brief in opposition, the Government makes efforts to divert attention from the main issue in this case: whether an act, perfectly innocent when done, can become criminal through a subsequent independent transaction. That issue is of paramount importance here.

It is undisputed that when Korholz, president of Rock Wool, personally guaranteed on August 6, 1953, payment to the bank of Bierig's loan, not a single one of Rock Wool's employees belonged to the union. The

Government does not deny this. It follows that no offense was committed at the time the guarantee was made. There is no evidence whatever that there was any intent then or thereafter to violate or evade any law.

The first payment on his loan—a substantial payment of $500—was made by Bierig himself, the borrower, president of the union. It was not until April 3, 1954 that Korholz paid anything ($300) to the bank on the Bierig loan. This payment on account was made after Bierig had defaulted, and the bank had demanded that Korholz make good on his guarantee (Brief in Op. p. 5). On September 21, 1955, more than two years after Korholz guaranteed payment of the loan, the union of which Bierig was president became the bargaining agent of Rock Wool's employees. During the interim, and as a consequence of the union's efforts to unionize the Rock Wool operation, some of the drivers (about five all told) joined and left the union intermittently. The record does not show accurately the period when each one was in or out of the union, even if their membership or the temporary membership of any one of them is relevant for any purpose.

The Government fails to dispute, because it cannot, that Korholz's guarantee of Bierig's loan violated no law when made. And this Court has held, as stated in the petition, that "the criminal intent essential to a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction." *United States* v. *Fox*, 95 U. S. 670. To the same effect are *United States* v. *Dietrich*, 126 Fed. 671, and *Terry* v. *United*

States, 131 F. (2d) 40. All three of these cases are cited on our petition, but not a single one of them is mentioned in the Government's brief in opposition. Those citations are dispositive of this case.

II. Bierig Received Nothing From Rock Wool

The Act of 1947 makes it an offense for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of his employees. There is no evidence in the record to prove that Rock Wool, indicted as the employer, paid anything to Bierig, president of the union local, or agreed to pay him anything. The obligation to pay was Korholz's individual obligation. There is no evidence whatever to prove that Bierig, whose debt was reduced as a result of the bank's demands on Korholz, ever knew Rock Wool, the alleged employer, in the transaction, or had any idea that Rock Wool's account was being used by Korholz to reduce the debt. The payments made to the bank were charged as made on Rock Wool's books to Korholz or to M.P.M. (Korholz's family investment company), and eventually to Rock Wool, but the record is silent as to the nature of the financial relationship between Rock Wool and Korholz, so that it may be that all of the funds were really Korholz's, no matter what entries were made. (See note 4, page 9 of the Petition).

III. The Entire Transaction Is Outside the Purview of the Act of 1947 and of the Indictment

The indictment charges merely the payment of money, and omits payment of a thing of value included in the statute. What has happened is that Bierig's liability was transferred over the years from

the bank to Korholz. Bierig still owes the money to Korholz, and not to Rock Wool, with which he had no financial relationship whatever. And there never was any "payment" of money by anybody to Bierig. The Act of 1947 did not treat a loan as a payment of money, and it cannot be construed to include loans as such payments. As pointed out, if the making of a loan is a thing of value, the indictment in this case fails to make a charge that Bierig was paid a thing of value.

The Government, in the trial below, proved the *bona fides* of the loan to Bierig. He not only paid $500 on account of the loan, but the Government proved that Bierig paid all of the bank's interest charges on the loan (except the last $5) over the period beginning August 6, 1953, and ending early in 1956 (See Gov. Ex. 45, column captioned "Interest"). Interest charges paid by Bierig out of his own pocket amounted to a total of $201.47. This evidence, offered by the Government, is, we submit, sufficient proof that no offense was committed at any time by Rock Wool, by Korholz or by Bierig. Nobody in Bierig's financial situation pays out hundreds of dollars in interest on an alleged gift of money, and that is what the indictment charges.

The Government, in its Brief in Opposition, endeavors to make much of the fact that, after Bierig reduced his loan from the bank by $500, he obtained an increase in his loan by $800 (on which he likewise paid interest). Of course, Korholz (not Rock Wool) agreed to this increase, and Korholz (not Rock Wool) was obligated to guarantee it under the document he signed on August 6, 1953. Because of the reductions

which had been made by Bierig and by Korholz on the amount of the original loan, this addition did not increase the debt above the original amount (Petition, p. 8, 9). And again we point out that the union did not become the bargaining agent for Rock Wool's employees until August 21, 1955, more than two years after Bierig made his original loan from the bank and approximately eight months after the reduced loan was increased.[1]

IV. The Government Fails to Meet Other Important Issues

The Government simply ignores the fact that the record does not prove that Bierig was the representative of the employees within the meaning of the Act despite his title as president, but that Graf was. The Government does not meet the issue expressly left open in *United States* v. *Ryan*, 350 U.S. 299. In this case the Government proved only that Bierig was the president, and practically nothing else on the point. This record does not show what Bierig's duties really were. The Government also endeavors to minimize or eliminate the effect of the plain language of the exception in Section 302(c)(2) of LMRA of 1947. We submit that the provisions of the act do not apply to the settlement or release of any claim. The Government (note 6, page 11 of its Brief in Opposition) undertakes to summarize its interpretation of the statute, and in so doing adds language which changes its meaning and application. The Government says that the section

[1] The record does not show it, but we are now advised that the employment contract with the drivers (dated April 24th, 1956) was made by the union with MPM Investment Company, (Korholz's family corporation) and not with Rock Wool.

"allows the employer to pay to the representative of its employees the judgments, arbitration awards, or, if the dispute has not reached a final, formal decision, payments in settlement or compromise of outstanding claims or disputes (between labor and management)."

But this is not the language of the statute at all. The statute reads as follows: "The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." The statute exempts "any claim." This Court, of course, will not permit the Government to add or insert its own phraseology by parenthesis or otherwise to the Act of 1947 for the purposes of this case.

The Government adopts a suggestion that the amounts charged to Korholz or to MPM on Rock Wool's books were eventually charged off on Rock Wool's books for labor relations services. (Brief in Op. p. 11). But this ignores the fact that the witness Best testified (R. 139) that the charge had been eliminated on the income tax return; and Thompson testified (Petition, p. 9, 10) that the items could not be charged to the current year's (1957) expense. What was done in 1957 is irrelevant, as the period laid in the indictment terminated April 17, 1956, but apparently the Government, once the prejudicial suggestion was made, did not attempt to prove what actually happened. There is every reason to believe, however, that Korholz followed the advice given him

by his accountants. Certainly none of them testified to the contrary.

CONCLUSION

The convictions in this case involve a serious miscarriage of justice which, we believe, could only happen during a period when the public was inflamed over the charges of corruption and worse in certain labor unions, particularly the Teamsters. We respectfully submit that the writ should be granted, and, if the Court agrees that acts innocent when done cannot become criminal by subsequent independent transactions, the judgment should be reversed.

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